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FOREWORD: RACIST SPEECH ON CAMPUS

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The issue of race relations appears to many the most intractable domestic problem facing the United States today. We are told that tensions between the races have increased substantially during the last decade, although it is difficult to demonstrate the truth or falsity of that assertion. Although more incidents are labeled as racial than a decade ago, substantial incentives exist to so label disputes, both for disputants—in the form of immediate attention of policy makers and the press—and for the press itself—which has come to learn that consumers of news have a voracious appetite for racial disputes. Thus, for example, an ordinary traffic accident in which a Hasidic Jew kills a black child is converted from a private tragedy into front-page national news.

To the extent that there actually is an increase in racial tensions and incidents, a number of causes have been suggested. These range from an asserted greater social acceptability of expressions of racism under President Reagan—a dubious assertion in a decade when public statements of even arguably racist attitudes have resulted in substantial public censure[1]—to a white backlash over racial preferences for minorities.

This symposium issue of THE WAYNE LAW REVIEW addresses one of the most visible signs of racial turmoil in this country, racist speech on college and university campuses, and it focuses on an increasingly popular form of symptomatic relief—the suppression of that speech by "racist speech codes." The first three articles provide different perspectives on the case of *Doe v. Uni-*

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1. Consider, for example, the experiences of James Watt, Earl Butz, Al Campanis, Jimmy Breslin, and Andy Rooney.

versity of Michigan.[2] Judge Avern Cohn furnishes insight into the process by which he concluded that the University of Michigan racist-speech policy violated the first amendment. Professor Robert Sedler, who represented Doe, argues that campus speech codes are fundamentally misconceived, having as they do the objective of prohibition of racist ideas. In contrast, Henry Saad, who represented the University of Michigan in *Doe*, argues that campus bans on racist speech, if properly tailored, are justified by goals of racial equality.

Professor Charles Martin's essay examines the origins of racial conflict on campuses beginning with the desegregation of professional schools and goes on to discuss some of the current manifestations of this conflict. Professor Charles Jones argues that regulation of racist speech is warranted because of the substantial injury such speech causes to minorities in particular and to the cause of equality in general. He takes the position that first amendment values have been improperly elevated over equality values.

Patricia Hodulik, Senior System Legal Counsel for the University of Wisconsin, describes the experience of the University of Wisconsin, which has also adopted a racist-speech code that is currently under challenge. Ms. Hodulik argues that the Wisconsin code, which is narrower than the invalidated Michigan code, is both protective of first amendment values and an effective response to campus harassment.[3] Professor Alan Brownstein advocates adoption of codes that concentrate on voluntary mediation and conciliation of specific disputes. He suggests that universities can avoid problems of vagueness and overbreadth by limiting sanctions to repetition of speech that is on a list of specifically condemned racist speech, a list that will evolve as the university rules on complaints in specific instances.

Finally, Congressman Henry Hyde and George Fishman make a case for a pending bill, entitled the Collegiate Speech Protection Act, that would extend the first amendment protection enjoyed by

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2. 721 F. Supp. 852 (E.D. Mich. 1989).

3. As this issue was going to press, the United States District Court for the Eastern District of Wisconsin issued a decision striking down the Wisconsin code. UWM Post, Inc. v. Board of Regents of the University of Wisconsin System, No. 90-C-328 (E.D. Wis. Oct. 11, 1991). The decision was based primarily upon the court's conclusion that the code was unconstitutionally overbroad because it reached a substantial amount of speech that did not constitute "fighting words" under Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

students in public universities to students in private universities that receive federal funds. They chronicle examples of suppression of expression on campus and describe the operation of the bill.

The depth of the division between those advocating suppression of racist speech and those resisting such suppression unfortunately has become obscured by the rhetoric of common ground. Those who would regulate such speech claim devotion to free speech principles, while at the same time identifying a need to draw the line between protected and unprotected speech in such a way as to allow regulation of racist speech. The defenders of free speech, on the other hand, argue their opposition to racism, while at the same time insisting that the line between protected and unprotected speech must be drawn so as to forbid regulation of at least some racist speech. Thus, a fundamental issue of personal liberty appears to be reduced to a technical line-drawing dispute between two groups, both of whom cherish free speech and abhor racism.

The fact that reasonable people may reach different conclusions about this question and the fact that the partisans on this issue profess a set of shared values cannot disguise the fact that there is a basic conflict between them: whether students should be insulated from speech they find disturbing because of the message that it conveys. Even apart from first amendment doctrine, there is a substantial question whether we can achieve an increase in tolerance through suppression of noxious views. Put another way, is it realistically possible to impose an "enforced sensitivity" to others?

My own view is that values of tolerance and pluralism are not achieved by suppression of intolerant views.[4] Moreover, even if the goals of racist speech policies were achievable, the price, in the form of lost first amendment liberties, is simply too high. This cost threatens to achieve monumental proportions when one considers the difficulty of developing a first amendment jurisprudence that would uphold most racist speech codes but have no application to other expression. In time, we may come to realize that to sanction a rule that allows speech to be banned because listeners find the message distressing is to make a compact with the Devil.

It is the purpose of this Symposium to provide a variety of perspectives on one of the knottiest issues currently facing institutions of higher learning. If it causes readers to think about this issue in new ways, it will have fulfilled its purpose.

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4. *See generally* Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481 (1991).